

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL J. TALLEY and)
SUSAN TALLEY, husband)
and wife,)
)
Plaintiffs,)
) C.A. No. 05C-08-311-PLA
v.)
)
TRI-STATE WASTE SOLUTIONS,)
INC., a Delaware corporation, and)
GEORGE T. COLLINS, SR.,)
)
Defendants.)

UPON CONSIDERATION OF PLAINTIFFS’ MOTION IN LIMINE TO STRIKE DEFENDANTS’ “LATE-DESIGNATED” FACT AND EXPERT WITNESS OR, IN THE ALTERNATIVE, TO PERMIT PLAINTIFF TO DESIGNATE A SUPPLEMENTAL ENGINEERING WITNESS
GRANTED in part, DENIED in part

Submitted: June 7, 2007
Decided: June 26, 2007

This 26th day of June, 2007, it appears to the Court that:

1. On March 3, 2004, Michael J. Talley was operating a motorcycle and traveling eastbound on Nottingham Road approaching the intersection of Jackson Hall Road. A trash-hauling truck, owned by Tri-State Waste Solutions, Inc. and operated by George T. Collins, Sr. (collectively “Defendants”), was traveling westbound on Nottingham Road

and was preparing to make a left turn onto Jackson Hall Road. Mr. Collins began to initiate the truck's left turn, unaware of Mr. Talley's approaching motorcycle until it was too late. The motorcycle collided with the truck. Mr. Talley suffered severe injuries, including the amputation of a leg. Mr. Talley and his wife, Susan Talley, (collectively "Plaintiffs") subsequently filed this action against the Defendants.¹

2. Plaintiffs have now filed a motion in limine pursuant to Super. Ct. Civ. R. 16(f) ("Rule 16(f)") to strike Defendants' "late-designated" fact and expert witness, Joseph D. Hudak, P.E., or, in the alternative, to permit Plaintiffs to designate a supplemental engineering witness. Plaintiffs contend that Defendants should not be permitted to call Mr. Hudak as a fact or expert witness because he was not identified before the initial deadline contained in the trial scheduling order. Plaintiffs alternatively argue that, if the Court is unwilling to strike Mr. Hudak, the Court permit Plaintiffs to retain a professional engineer to review and rebut Mr. Hudak's measurements and anticipated testimony, and to take the discovery deposition of Mr. Hudak at Defendants' expense.²

¹ See Docket 2. "Docket [#]" refers to the number assigned by LexisNexis File & Serve.

² See Docket 55.

3. Defendants respond by insisting that Mr. Hudak's involvement in this case was only to make measurements of the accident scene for use by Defendants' liability expert, Thomas P. Lacek, P.E., and that Mr. Hudak was merely identified as a potential witness out of an excess of caution. Defendants contend that the measurements and information developed by Mr. Hudak were timely disclosed to Plaintiffs via Mr. Lacek's timely submitted expert report. Defendants also contend they gave Plaintiffs notice of the potential use of Mr. Hudak as a witness before the expert discovery deadline, which was extended upon the entering of a stipulation by both parties. Furthermore, Defendants admit that Mr. Hudak will not be used as an expert because he has no opinions to disclose; that is, the substance of any testimony he may give will be nothing more than a description of the use and accuracy of the device he took measurements with, his specific technique in using it, and the data he has obtained from those measurements. Lastly, Defendants argue that Plaintiffs will not be prejudiced by having Mr. Hudak testify as a fact witness.³

4. The trial scheduling order sets a December 1, 2006 deadline for Defendants' expert report or Super. Ct. Civ. R. 26(b)(4) disclosure, and a February 5, 2007 deadline for "Final Discovery Cut-Off." On February 6,

³ See Docket 70.

2007, the parties stipulated that “the expert discovery cut-off may be extended” to April 5, 2007 and that “[a]ll other dates in the Court’s prior Case Scheduling Order shall remain in force and effect.” Accompanying the stipulation filed with the Court was a letter from Plaintiffs’ counsel informing the Court that the extension was needed because Defendants’ expert’s (Mr. Lacek) deposition could not be taken until February 12, 2007. Therefore, it would appear that the stipulation was entered solely to ensure that Plaintiffs were not in violation of the trial scheduling order since Mr. Lacek’s deposition could not be taken until after the deadline.

5. On February 28, 2007, Defendants sent Plaintiffs a letter “to disclose Joseph D. Hudak, P.E. as a fact and expert witness.” Defendants further stated that they plan to call Mr. Hudak to testify at trial. This disclosure, however, was clearly untimely. Given that the stipulation was entered only for the purpose of allowing Plaintiffs to take Mr. Lacek’s deposition (as is evidenced by the letter accompanying the stipulation), it would be unfair to allow the Defendants to disclose another expert so late. Therefore, Mr. Hudak shall not be permitted to testify as an expert (although it appears Defendants never intended to use Mr. Hudak in such a capacity as he “has no opinions to disclose.”).

6. Defendants are, however, permitted to call Mr. Hudak as a fact witness. Plaintiffs are clearly questioning Mr. Lacek's report with respect to his reliance on the measurements and data developed by Mr. Hudak and have made it apparent that they may object to Mr. Lacek's report based on hearsay or lack of first hand knowledge. The Plaintiffs were well aware of the measurements and site inspection performed by Mr. Hudak because such data was included in Mr. Lacek's expert report, which was timely submitted on December 1, 2006. Therefore, Defendants shall be permitted to call Mr. Hudak as a fact witness.

7. Based on the foregoing, Defendants are not permitted to call Mr. Hudak as an expert witness, but are permitted to call Mr. Hudak as a fact witness. Accordingly, Plaintiffs' motion is **GRANTED in part** and **DENIED in part**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael L. Sensor, Esquire
Michael K. Tighe, Esquire